SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
DEC 17 1970
E. ROBERT SEAVER, CLERK

No. 1119

In the
Supreme Court of the United States

PACIFIC INDEMNITY COMPANY,
Petitioner,

v.

ACME DELIVERY SERVICE, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BURFORD, RYBURN & FORD,
1511 Fidelity Union Life Building,
Dallas, Texas 75201,
Attorneys for Petitioner.

THE WARLICK PRESS DIVISION, STEER-WARLICK CO.
P. O. BOX 10040 — 1409 ROUND TABLE DRIVE — DALLAS — 631-2120

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	17
Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit, August 6, 1970	A-1
B — Opinion of the United States Court of Appeals for the Fifth Circuit, September 18, 1970	B-1
C — Order Allowing Counsel to Withdraw	C-1
D — Judgment	D-1

Page

Cases

Abraham Lincoln Life Ins. Co. v. Kleven,
33 F. 2d 639 (D. Mass., 1929) 14

American Fidelity and Casualty Company v.
Williams, Tex. Civ. App., 34 S.W. 2d 398 17

American Ins. Co. v. Lester,
214 F. 2d 578 (4th Cir., 1954) 11

American Life Insurance Co. v. Stewart,
300 U.S. 203, 57 S. Ct. 377, 81 L. Ed. 605 14

Atlantic Coast Line R.R. v.
Brotherhood of Locomotive Engineers,
U.S. Ct.
26 L. Ed. 2d 234 6, 7, 8, 14

Brown v. Pacific Mut. Life Ins. Co.,
62 F. 2d 711 (4th Cir., 1933) 14

Dairyland Insurance Company v. Frith,
419 F. 2d 1325 (5th Cir., 1970) 3, 15, 16

Great American Indemnity Co. v. City of Corpus
Christi, 192 S.W. 2d 917, C.C.A. 1945 17

Jamerson v. Alliance Ins. Co. of Philadelphia,
87 F. 2d 253 (7th Cir., 1937) 13

Looney v. Eastern Texas R. Co., 247 U.S. 214,
38 S. Ct. 460, 62 L. Ed. 1084 8, 9, 13

Mutual Ben. Health & Accident Assn. v. Teal,
34 F. Supp. 714 (E.D.S.C., 1940) 14

Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa,
42 F. Supp. 917 (S.D. Idaho, 1942) 13

Toucey v. New York Life Insurance Co.,
314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100 8, 9, 10, 18

Womack v. Allstate Insurance Co.,
156 Tex. 467, 296 S.W. 2d 233 16, 17

Page

Statutes

28 U.S.C. 379	9, 13
28 U.S.C. Section 1295(1)	2
28 U.S.C. 2283	2, 3, 6, 7, 8, 13, 17

Miscellaneous

Reviser's Note, 28 U.S.C. 2283	9, 10
1A Moore's Federal Practice, Section 0.208 (3-4)	10, 11

No.

In the

Supreme Court of the United States

PACIFIC INDEMNITY COMPANY,

Petitioner,

v.

ACME DELIVERY SERVICE, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on August 6, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, p. A-1. The opinion of the Court denying Petitioner's Motion for Rehearing, handed down September 18, 1970, is printed in Appendix B hereto, infra, p. B-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 6, 1970; a timely motion for rehearing was filed, and denied, on September 18, 1970. The judgment of the United States Court of Appeals for the Fifth Circuit issued as and for the mandate was entered on September 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the trial court, in a suit for declaratory judgment to determine whether coverage existed under a policy of aviation insurance, was precluded by 28 U.S.C. 2283 from staying state court actions against the purported assured as "necessary in aid of jurisdiction," where such person had refused to permit the insurer to defend under reservation of rights or a non-waiver agreement.

(2) Whether the Court of Appeals erred in failing to modify its opinion so as to expressly reserve to Petitioner the right to litigate the question of coverage in the declaratory judgment action without regard to the effect of its participation in the defense of the state court actions under

the decision in *Dairyland Insurance Company v. Frith*, 419 F. 2d 1325 (5th Cir. 1970).

STATUTE INVOLVED

This case involves the construction of 28 U.S.C.A. 2283, which is hereinafter set forth verbatim:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

On December 2, 1966, Petitioner issued an Aviation Hull and Liability Policy to Acel Delivery Service, Inc., insuring a 1962 Piper Comanche Aircraft. The aircraft crashed on May 27, 1967, at Raton, New Mexico, killing Wendell A. Williams, pilot, Joe Mack Talley, a passenger, and seriously injuring Walter C. Talley, another passenger. The pilot and both passengers were residents of the State of Texas; the owner of the aircraft, Acel Delivery Service, was a Texas corporation.

On May 13, 1968, suit was filed by George and Josephine Edmondson against Acel Delivery Service, Inc., and the Estate of Joe Mack Talley, in Cause No. A33,991, in the District Court of Bernalillo County, New Mexico. These plaintiffs were damaged when the aircraft crashed into a barn they were occupying. Petitioner took over the defense of Acel after obtaining a non-waiver agreement reserving its rights to later deny coverage. However, it refused to defend the Talley Estate. This action is still pending.

On November 22, 1968, the estate of Joe Mack Talley and Walter C. Talley filed suit against the estate of the pilot, Wendell Williams, in Cause No. 54709-C in the 96th District Court of Tarrant County, Texas. Petitioner sought to defend Mrs. Shirlee Williams Singer, widow of Wendell A. Williams, under reservation of rights or a non-waiver agreement, but was advised by the attorney for Mrs. Singer that she demanded Petitioner to accept full, unconditional and unqualified responsibility for the defense of such action, and the payment of any judgment recovered by the plaintiffs therein. (Pl. Ex. Nos. 6, 7, 8, 9, 10 and 11; T., pp. 140-149.) Nevertheless, Petitioner employed attorneys who filed an answer and defended such action on behalf of the pilot's estate, until October 9, 1970.

On March 26, 1969, Petitioner filed this suit against Acel Delivery Service, the Talleys and others, seeking a declaratory judgment that its policy did not afford coverage of the accident in question, and an injunction staying the further prosecution of the suits then pending in Texas.

In its complaint, Petitioner alleged that the policy afforded no coverage of the accident in question for the following reasons:

(1) The aircraft was leased or rented;

(2) The pilot was not a properly qualified pilot within the terms of the policy, in that he did not have the minimum number of hours of flying time of the kind required by the policy;

(3) That a charge had been made for the use of the aircraft;

(4) That the named insured had breached the policy by bring a suit for damages against the pilot; and

(5) That the named insured had concealed and/or misrepresented material facts concerning the use of the aircraft.

At the hearing on temporary injunction, Petitioner introduced evidence substantiating each of these allegations; the respondents offered no evidence.

On July 18, 1969, the District Court granted an interlocutory injunction in accordance with Petitioner's request. The Talleys appealed from this injunction restraining them from prosecuting their state court suit against the pilot's estate, and they sought and obtained from the United States Court of Appeals for the Fifth Circuit an order that further proceedings in the United States District Court be stayed until the appeal was finally decided.

The Court of Appeals, on August 6, 1970, rendered judgment reversing the judgment of the District Court and dissolving the injunction. Petitioner filed a timely Motion for Rehearing, which was overruled on September 18, 1970, in a written opinion by the Court of Appeals.

Following the opinion of the United States Court of Appeals for the Fifth Circuit on motion for rehearing, the attorneys employed by Petitioner to defend the actions brought by Walter C. Talley and Joe Mack Talley against the Estate of Wendell A. Williams, Deceased, in state court filed motion for leave to withdraw as counsel; their motion was granted on October 9, 1970. A copy of the order entered granting such motion is attached as Exhibit C, infra,

p. C-1. Subsequently, on November 16, 1970, a judgment was entered in that action, a copy of which is attached as Exhibit D, infra, p. D-1.

A suit brought by Respondent Edward L. Baker against the Estate of Wendell A. Williams, Deceased, and Acel Delivery Service, Inc. is still pending in the 17th District Court of Tarrant County, Texas.

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that, under the decision of this court in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, U.S. . S. Ct. . 26 L. Ed. 2d 234, the injunction granted by the District Court herein staying further proceedings in the actions which have grown out of the crash of the aircraft insured by Petitioner and which are pending in Texas courts was not "necessary in aid of its jurisdiction" under 28 U.S.C. 2283. The Court of Appeals seems to place controlling emphasis upon that portion of the opinion in which this court states that the phrase "necessary in aid of its jurisdiction" "involves something similar to the concept of injunction to 'protect or effectuate' judgments" for it noted that petitioner is not a party to the state court proceedings, and that the issue of coverage is not there involved.

In view of the fact that judgments have now been taken by the plaintiffs in one of such actions, Petitioner is in the position of being subject to suits in a state court by the judgment creditors in such cause in which the question of coverage under Petitioner's policy may also be raised and litigated, regardless of the judgment which may ultimately

be entered by the District Court upon the trial of this cause on its merits. Since the relative positions of the parties have changed, Petitioner submits that, in any event, an injunction would be proper under the test announced by the Court of Appeals, if its interpretation of the opinion of this Court in the *Atlantic Coast Line* case is correct. However, Petitioner also submits that the Court of Appeals erred in holding that state court proceedings can be enjoined by a Federal District Court under 28 U.S.C. 2283 as "necessary in aid of its jurisdiction" only under circumstances substantially similar to those in which a District Court could issue an injunction to "protect or effectuate its judgment."

Petitioner contends that, although this Court obviously announced a principle of strict interpretation with regard to 28 U.S.C. 2283, it did not so limit the grounds upon which state court proceedings could be enjoined. First, the Court took pains to point out that with respect to the controversy there before it, to the extent that the state court might decide certain questions of federal law, or in deciding questions of state law, reach a result which was precluded by federal law, its judgment was subject to ultimate review by this Court itself. Under such circumstances, state and federal court could not reach inconsistent results, even though the pendancy of two proceedings involving the same issues might prove cumbersome, there would be no real need for an injunction either before or after judgment.

Second, the Court amplified the above quoted language by stating:

> "Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be nec-

> essary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."

The term "impair" is generally defined as meaning "to diminish or weaken." Words and Phrases, "Impair." This, to Petitioner, suggests that this Court would not limit injunctions necessary in aid of jurisdiction to cases in which such an injunction, if issued before judgment, would prevent relitigation. Certainly, if Congress had intended the meaning of the phrase "necessary in aid of its jurisdiction" to be so limited, it could have used less obscure language in doing so.

Since the Court did not in the *Atlantic Coast Line* case expressly overrule any specific line of cases in which an injunction had been issued as necessary in aid of jurisdiction, we urge the Court to consider the question whether 28 U.S.C.A. 2283 has ousted the equitable jurisdiction of a federal court to issue injunctions, including stays of state court proceedings, where necessary to afford a litigant before it complete relief and to prevent irreparable injury to the party seeking a temporary injunction. It is the position of Petitioner that Sec. 2283 only announces a rule of extreme restraint which calls for withholding the use of the power to enjoin state court proceedings in all but extreme cases. This is such a case.

To begin with, the Supreme Court in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100, expressly held that cases such as *Looney v. Eastern Texas R. Co.*, 247 U.S. 214, 38 S. Ct. 460, 62 L. Ed.

1084, which it characterized as one in which the federal district court enjoined a state court proceeding "merely to protect its jurisdiction" until the suit pending before it was finally settled, were not controlling of the case then before it.[1]

Although the Court in *Toucey* held that the Looney Case was not a relitigation case, it nevertheless did not classify it as a case within the recognized non-statutory exception to 28 U.S.C. 379 (a predecessor of 28 U.S.C. 2283) for cases where the federal court's jurisdiction was *in rem* or *quasi in rem*. To at least a majority of the Court in *Toucey*, then, the rationale of the decision in *Looney v. Eastern Texas R. Co.* obviously did not conflict with the interpretation of Sec. 379 which they announced.

Before discussing other cases which in our view embody the principles of the decision in the Looney Case, we think it appropriate to point out that the portion of the 1948 Amendment to 28 U.S.C. 379 which added the language "where necessary in aid of its jurisdiction" would not have been necessary in light of the *Toucey* decision, if its sole purpose was to take cognizance of the power of federal courts to enjoin state court proceedings where such proceedings are begun after *in rem* or *quasi in rem* proceedings are instituted in a federal court. *Toucey* recognized and approved the power to stay state court proceedings

[1] *Looney v. Eastern Texas R. Co.* was a suit in which various carriers attained a preliminary injunction restraining the Attorney General of Texas from assessing fines and penalties upon them for complying with an order of the Interstate Commerce Commission. After the injunction had been granted the Attorney General brought suit in a state court to enjoin the carriers from complying with the Commission's order. It was at this point that the injunction referred to in the Toucey case was issued.

in such cases. Certainly, if this was the purpose of this addition it is not reflected by the Revisor's Notes under 28 U.S.C. 2283, which state "The phrase 'in aid of its jurisdiction' was added to conform to Section 1651 of this title, and to make clear the recognized power of the federal courts to stay proceedings in State cases removed to the district court." To the extent that this language covers removal actions, it filled a void reflected by the opinion in *Toucey*. And although the language "in aid of its jurisdiction" may and doubtless should be construed to include the power to enjoin pending state court proceedings in *in rem* and *quasi in rem* actions, the reference in the Revisor's Notes to Sec. 1651 seems a clear indication that this language does not restrict the injunctive power of the federal courts to such cases, nor is it an absolute prohibition against stays of *in personam* actions pending in state courts.

Rather the phrase "in aid of its jurisdiction" must have been intended to permit federal courts to enjoin pending state court actions where necessary to afford litigants complete relief and to prevent irreparable injury — such power to be exercised, however, in the court's discretion and in light of the rules of comity.

Section 0.208(3-4), *1A Moore's Federal Practice* explains this language as follows:

> "Since even *Toucey* recognized that a federal court may protect its *in rem* jurisdiction, and the power to do so involves a principle of necessity, clearly the second exception recognizes the power to grant an injunction against proceedings that interfere with the control and disposition of the *res*. This concept of *in*

> *rem* jurisdiction 'is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.'
>
> "But the second exception in Sec. 2283 embraces more than *in rem* cases. It is not meant to subvert the rules that, as a general proposition, two *in personam* actions may run concurrently, or that an action *in rem* or *quasi in rem* does not preclude an *in personam* action that does not interfere with the custody and control of the *res*. It is, however, meant to give sufficient flexibility that a federal court, as a court of equity, may, when it has jurisdiction, mould its process to deal adequately with the situation at hand. * * *"

This conclusion has been reached in suits for declaratory judgment as to questions of coverage under an insurance policy, and the exercise of such power seems particularly appropriate in such cases. In *American Ins. Co. v. Lester*, 214 F. 2d 578 (4th Cir., 1954), plaintiffs were insurance companies which had issued policies on a coal-tipple leased by defendant Correale to defendant Lester. Some of the policies were procured by Correale, and others by Lester. The policies procured by Lester covered both Correale and Lester "as their interest may appear." The policies procured by Correale were blanket policies which limited the liability of the individual issuer to its pro rata share of all of the insurance covering the property. The plaintiff companies issuing the blanket policies contended that such policies were void because of willful misrepresentations by Correale and concealment of material facts. The companies issuing the

policies procured by defendant Lester contended that such policies were invalid and raised questions concerning the ownership of such policies, althought the opinion does not elaborate upon these matters. Defendant Lester brought a number of suits in state courts against the companies which issued the policies procured by it, seeking recovering in each suit of damages less than the minimum jurisdictional limits of the federal courts in order to preclude removal. Defendant Correale made demand upon the companies issuing the policies procured by it for settlement of its claims, and threatened to bring similar actions in state court unless its demands were met.

The plaintiff insurance companies brought suit for a declaratory judgment seeking to determine the validity of the policies issued by them and the questions of coverage arising under the several policies. The trial court dismissed the action on the ground that there was no diversity of citizenship; its judgment was reversed by the Court of Appeals, and the case was remanded to the District Court for further proceedings. In its opinion the Court of Appeals called to the attention of the District Court its power to enjoin the proceedings brought and threatened to be brought by the defendants in the state courts. The Court stated:

> "Since this case must be remanded to the District Court, we think it advisable to express the view that it has the power, to be exercised in its discretion, to enjoin the Lesters from proceeding further in the civil actions they have filed in the West Virginia State court. Without such a power, the granting of a declaratory judgment may well, in many cases as in the instant case, fall short of attaining the objectives which

> are sought in proceedings looking to a declaratory judgment. The power of the court to grant injunctive power is not only 'in aid' of the court's jurisdiction but is essential to its effective exercise."

Earlier in its opinion, the Court delineates the principal issues in the case as being "the protection of the plaintiffs against two liabilities on the policies * * *; and the safeguarding of plaintiffs against multifarious civil actions in different courts, in which utterly inconsistent results might well be reached."

Two earlier decisions in which the courts held that an injunction of pending state court actions was not precluded by 28 U.S.C. 379 under circumstances similar to those in *Lester* are *Jamerson v. Alliance Ins. Co. of Philadelphia*, 87 F. 2d 253 (7th Cir., 1937) and *Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa*, 42 F. Supp. 917 (S.D. Idaho, 1942). Both are cases in which multiple insurers sought a declaratory judgment as to questions of coverage and the injunction of a pending action in a state court. In both, the contention was advanced that the court did not have jurisdiction to enjoin proceedings in a state court under the statutory predecessor of 28 U.S. 2283, 28 U.S.C. 379. The court in each case rejected this contention, and upheld the issuance of a preliminary injunction staying state court proceedings pending a determination of the merits of the action pending in federal court.

In these cases, as in the Looney Case, supra, the purpose of the injunction was in part to preserve the status quo until the federal court could determine the case before it on its merits. Analogous cases are those in which an insurance

company brings an action to cancel a policy containing an incontestability clause on the grounds of fraud in federal court before the policy becomes incontestable, and after the policy becomes incontestable, an action to recover benefits is brought in state court, when the defense of fraud is cut off. Under such circumstances, there is no assurance that judgment will be entered in the federal action first, and a judgment in the state action would defeat the exercise by the federal court of its jurisdiction. Under such circumstances, stays of the state court proceedings have been held proper. *Brown v. Pacific Mut. Life Ins. Co.*, 62 F. 2d 711 (4th Cir., 1933); *Mutual Ben. Health & Accident Assn. v. Teal*, 34 F. Supp. 714 (E.D.S.C., 1940); *Abraham Lincoln Life Ins. Co. v. Kleven*, 33 F. 2d 639 (D. Mass., 1928); Cf. *American Life Insurance Co. v. Stewart*, 300 U.S. 203, 57 S. Ct. 377, 81 L. Ed. 605.

We submit that there is a fundamental distinction between such cases and the *Atlantic Coast Line* case, in that an injunction of the state court proceedings in the latter case would have had the effect of ousting the state court from jurisdiction over the issues before it, while in the former cases, as in the case at bar, an injunction would merely delay the state court proceedings.

In the present posture of this case, it is clear that inconsistent results could be reached in the State and Federal Courts in suits between the same parties involving the coverage issue, and as we have previously stated, this could not have occurred in the Atlantic Coast Line case. Rather, Petitioner's position is much the same as that of the in-

surer in *American Life Insurance Co. v. Stewart*, supra. There, this Court had no difficulty in finding that the injunction was necessary in aid of federal jurisdiction; we ask the Court to hold that the injunction granted by the District Court herein was and is also necessary in aid of its jurisdiction.

In its opinion dissolving the injunction, the Court of Appeals recognized that Petitioner might, by further defense of the state court proceedings, waive any policy defenses which it might have. Petitioner, by its Motion for Rehearing, sought to obtain from the Court of Appeals an express modification of its opinion by which that Court in the exercise of its equitable jurisdiction preserved petitioner's right to litigate the question of coverage without regard to the effect of its participation in the defense of the state court actions. As authority for such modification, we referred the Court of Appeals to its decision in *Dairyland Insurance Company v. Frith*, 419 F. 2d 1325 (5th Cir., 1970). We quote the Court's *per curiam* opinion in full:

> "Dairyland Insurance Company appeals from the District Court's order dismissing its petition for a declaratory judgment. This petition requested a declaration of the rights and other legal relations of the insurer and appellees with respect to a public liability insurance policy Dairyland had issued. Two questions of Georgia law were presented: (1) whether the coverage of the Dairyland policy extended to an action brought by a third person against some of the appellees in a Georgia state court, and (3) whether Dairy land had a duty to defend against that action. On the particular facts of this case, we conclude that the District Court exercised a reasonable discretion under

the Federal Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1964), in declining to decide the question of coverage. See, e.g., *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112, 82 S. Ct. 580, 582 (1962); *Amerada Petroleum Corporation v. Marshall*, 5 Cir., 1967, 381 F. 2d 661, 663. For the reasons of comity well expressed by the District Judge, we therefore affirm the judgment. Equitable considerations, however, require that we modify the judgment to this extent: By defending the state court action Dairyland is in no way to be denied the right to reserve the question of coverage and is not to be deemed estopped from so doing. We expressly reserve that right to Dairyland under the circumstances presented here."

The Court overruled Petitioner's Motion for Rehearing, stating that its action in the *Dairyland* case was based only upon the particular facts of that case. The effect of such refusal by the Court of Appeals was to force the attorneys employed by Petitioner to defend the action brought by the Talleys to withdraw from the defense of that case, since the opinions of the Court of Appeals clearly indicated that any further defense by Petitioner of such action would be at its peril. Petitioner contends that the record in this cause warranted relief by the Court of Appeals from the effect of an unconditional dissolution of the injunction granted by the District Court. Under Texas law, Petitioner could not, following the opinions of the Court of Appeals, continue its defense of the action brought by the Talleys in order to protect itself against recoveries therein which are excessive, unrealistic and unconscionable, and still litigate the question of coverage. *Womack v. Allstate Insurance Co.*, 156 Tex. 467, 296 S.W. 2d 233; *American Fidelity and Casualty Company v. Williams*, Tex. Civ. App., 34 S.W. 2d

396, er. ref.; *Great American Indemnity Co. v. City of Corpus Christi*, 192 S.W. 2d 917, C.C.A. 1945, er. ref., n.r.e.

The failure of the Court of Appeals to so modify its opinion has greatly prejudiced Petitioner's position with respect to its right to a determination of the question of coverage, while at the same time protecting itself against possible excessive liability in the event the coverage question is resolved adversely. We submit that this Court should, by way of alternative relief if it denies this petition for writ of certiorari, act to declare Petitioner's right to litigate the question of coverage while at the same time conducting the defense of the action brought by the Talleys.

CONCLUSION

Petitioner contends that the refusal by the Estate of Wendell A. Williams to permit the defense of the suits brought against it under reservation of rights or a non-waiver agreement gives rise to circumstances in which the federal court should exercise its power to enjoin state court proceedings, especially in view of the multiple exposure of Pacific Indemnity Company and in view of the serious questions raised as to coverage.

We urge that a proper construction of 28 U.S.C. 2283 should reflect and affirm this power under these circumstances. The exercise of this power in the case at bar is, we believe, consonant with the principles of equity and the rules of comity. This is not a case in which the federal court has acted to oust the jurisdiction of the state courts here involved over any proceeding now pending before

them. Rather, it is one in which the federal court has, in the language of Mr. Justice Frankfurter in *Toucey v. New York Life Insurance Company*, acted "merely to protect its jurisdiction" over the controversy before it.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BURFORD, RYBURN & FORD,
1511 Fidelity Union Life
Building,
Dallas, Texas 75201,
Attorneys for Petitioner.

PROOF OF SERVICE

I, Spencer C. Relyea, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of December, 1970, I served copies of the foregoing Petition for Writ of Certiorari on respondents by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their attorneys of record as follows:

Mr. Tom H. Davis
214 Austin National Bank Building
Austin, Texas 78701

Mr. John W. Hughes
800 Baker Building
Fort Worth, Texas 76102

Mr. Norman Darwin
500 W. T. Waggoner Building
Fort Worth, Texas 76102

Mr. Sam S. Stollenwerck
Republic National Bank Tower,
Suite 2110
Dallas, Texas 75201

Mr. William C. Manning
905 Irving Bank Tower Building
Irving, Texas 75060

Spencer C. Relyea

Spencer C. Relyea

EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28323

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellee,

v.

ACEL DELIVERY SERVICE, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

(August 6, 1970)

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: On May 27, 1967, a Piper Comanche aircraft crashed at Raton, New Mexico, killing the pilot, Wendell Williams, and a passenger, Joe Mack Talley. Another passenger, Walter C. Talley, was seriously injured. The aircraft was owned by the Acel Delivery Service, Inc. and was insured by the Pacific Indemnity Company.

On May 13, 1968, suit was filed by George and Josephine Edmondson against Acel Delivery Service, Inc., and the Estate of Joe Mack Talley, in Cause No. A33,991, in the

District Court of Bernalillo County, New Mexico. These plaintiffs were damaged when the aircraft crashed into a barn they were occupying. Pacific took over the defense of Acel after obtaining a nonwaiver agreement reserving its rights to later deny coverage. However, it refused to defend the Talley Estate.

On November 22, 1968, the estate of Joe Mack Talley and Walter C. Talley filed suit against the estate of the pilot, Wendell Williams, in Cause No. 54709-C in the 96th District Court of Tarrant County, Texas. Pacific filed an answer on behalf of the pilot's estate and has taken over the defense without obtaining a nonwaiver agreement.

On March 26, 1969, Pacific filed suit against Acel, the Talleys and others, in the court below seeking a declaratory judgment and an injunction enjoining the further prosecution of all state court suits growing out of the above crash except the suit pending in the New Mexico court.

On July 18, 1969, the court below granted an interlocutory injunction in accordance with Pacific's request. The Talleys have appealed from this injunction restraining them from prosecuting their state court suit against the pilot's estate.

The sole issue presented on appeal is whether a federal court, in a suit for declaratory judgment to determine whether coverage existed under a policy of aviation insurance, was precluded by 28 U.S.C. § 2283 from enjoining state court actions against the purported assureds "in aid of its jurisdiction", when such persons have refused to permit the insurer to defend them under a reservation of rights or non-waiver agreement.

The federal Anti-Injunction Statute, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

At the outset, we note, as this court did in *Tampa Phosphate R.R. v. Seaboard Coast Line R.R.*, 418 F. 2d 387, 392 (5th Cir. 1969), cert. denied, 397 U.S. 910 (1970), "[T]hat § 2283 applies irrespective of whether the federal injunction is directed to the parties [as here] or to the state courts."

Pacific Indemnity does not argue that there is express congressional authorization for an injunction in this type of action and we are in accord with that conclusion. Neither is it urged that the injunction was required to "protect or effectuate a judgment of the district court. Rather, Pacific maintains that the injunction entered by the court below was "necessary in aid of its [the court's] jurisdiction." 28 U.S.C. § 2283.

While the purpose and function of § 2283 has been drawn in question, we do not feel disposed, on the facts of this case, to explicate the history and background of a section which is already the subject matter of a plethora of decisional law in this and other circuits as well as in the Supreme Court.

The language of § 2283 is explicit in defining the circumstances in which a federal court may stay proceedings in a state court; however, certain timeworn judicially declared exceptions do exist. Thus, it is said that where the jurisdiction over the proceedings is *in rem* or *quasi in rem*, "[T]he state or federal court having custody of such property has exclusive jurisdiction to proceed." *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964). And more recently, *in personam* proceedings (criminal), instituted in state tribunals, have been stayed by federal courts — the equitable restraints being predicated on the constitutional imperative of freedom of speech. *See, e.g., Sheridan v. Garrison*, 415 F. 2d 699 (5th Cir. 1969), cert. denied, 396 U.S. 1040 (1970). Absent a *res* to be preserved and protected or the need for immediate vindication of first amendment rights, the federal courts have been hesitant to expand, by judicial improvisation, the exceptions Congress has created to the general prohibition of § 2283.

In the instant case, Pacific has denied coverage under the policy on several grounds, one of which being that the pilot of the aircraft was not properly qualified as required by the policy provisions. Pacific argues that in the absence of a stay of the proceedings now pending in state court, it must either waive its policy defenses or deny coverage and lose control of the litigation. This for the reason that in Texas, as in many other states, an insurance company by assuming and conducting the defense of a claim or action brought against its insured, with knowledge of facts which forfeit the coverage of the policy and without first effectively disclaiming liability, is thereafter precluded from defending an action on the policy and asserting no coverage on the basis of such facts.

In order to avoid this admittedly difficult choice of which course of action to pursue in the state court actions against its insured, Pacific contends that the injunction entered by the district court was "necessary in aid of its jurisdiction" to determine the question of policy coverage. Pacific further asserts that none of the decisions interpreting 28 U.S.C. § 2283 or any of its statutory predecessors have ousted the equitable jurisdiction of a federal court to issue injunctions, including stays of state court proceedings, where necessary to afford a litigant before it complete relief and to prevent irreparable injury to the party seeking a temporary injunction.

We are constrained to reject Pacific's arguments and its interpretation of § 2283. The Supreme Court, in the recent case of *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, U.S. , S. Ct. . 26 L. Ed. 2d 234 (1970), again had occasion to construe the meaning of § 2283. While the case involved a federal court injunction against the enforcement of a state court decree enjoining union picketing, we view the Court's guidelines in the application of § 2283 as controlling.

In *Atlantic, supra*, the Court made the following relevant observation:

> On its face the present Act [§ 2283] is an absolute prohibition against enjoining state court proceedings,

> unless the injunction falls within one of three specifically defined exceptions. The respondent here has intimated that the Act only establishes a 'principle of comity', not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1954 when this Court interpreted this statute, it stated: 'This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.' *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 515-516 (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction.
>
> U.S. at .

In construing the "necessary in aid of" phrase of § 2283, the Court noted that,

> [I]f the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be *'necessary in aid of'* that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or dis-

> position of a case as to seriously impair the federal court's flexibility and authority to decide that case.
>
> U.S. at .

And the Court concluded that:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.
>
> U.S. at .

Pacific Indemnity is not a party to the state court actions against its insured. Moreover, the question of coverage under the policy of insurance will not be litigated in those proceedings. The judgments rendered and the issues decided in the state court proceedings will in no way impair the federal court's flexibility and authority to decide the question of coverage under the policy.

Pacific's apprehension, that it may waive its policy defenses if it defends the suits in the state court, furnishes no reason under § 2283 to stay those proceedings.

Accordingly, and for the reasons above expressed, the judgment of the district court is REVERSED and the cause REMANDED with directions to dissolve the injunction.

EXHIBIT B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28323

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellee,

v.

ACEL DELIVERY SERVICE, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(September 18, 1970)

Before RIVES, GEWIN and INGRAHAM,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

We note, in addition, the appellant's request that our opinion of August 6, 1970, be modified to provide that

Pacific shall not be estopped to later deny coverage under the policy by defending the state court action against its assured. As authority for this requested reservation of rights, Pacific cites *Dairyland Insurance Co. v. Frith*, 419 F. 2d 1325 (5th Cir. 1970), which contained language of the same import. In *Dairyland*, however, the court was exercising its equitable powers *under the particular facts of that case*. Under the facts presented in the instant case, we do not deem it appropriate to secure to Pacific the requested reservation of rights.

C-1

EXHIBIT C

No. 54,709-C

96TH DISTRICT COURT
OF
TARRANT COUNTY, TEXAS

SANDRA TALLEY, et al.

v.

ESTATE OF WENDELL WILLIAMS

ORDER ALLOWING COUNSEL TO WITHDRAW

On this day came on to be heard, in due time, manner and form and after due notice, motion of Touchstone, Bernays & Johnston, to withdraw as counsel for the defendant, Estate of Wendell Williams, and it appearing to the Court that said motion is well taken and ought to be sustained, it is

Accordingly ORDERED, ADJUDGED AND DECREED that the firm of Touchstone, Bernays & Johnston, be and are hereby given permission to withdraw as attorneys of record for the defendant, Estate of Wendell Williams.

SIGNED this 8th day of October, 1970.

JOE SPURLOCK

Judge

EXHIBIT D

No. 54709-C

IN THE 96TH DISTRICT COURT
OF
TARRANT COUNTY, TEXAS

SANDRA TALLEY, Administratrix of the Estate of
Joe Mack Talley, Deceased, et al.

v.

ESTATE OF WENDELL WILLIAMS

JUDGMENT

BE IT REMEMBERED that on the 13th day of November, 1970, in the above styled and numbered cause, came the parties and their attorneys of record and announced ready for trial, a jury having been waived by all parties, the case was submitted to the Court, and after reading the pleadings and hearing the evidence and argument of counsel, the Court was of the opinion that the parties are entitled to the following judgment:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, Walter C. Talley, do have and recover of and from the defendant, Estate of Wendell Williams, the sum of Ninety-four Thousand Nine Hundred Seventy-nine and 45/100 Dollars ($94,979.45) for his personal injuries.

And it appearing to the Court that neither Walter C. Talley or his wife, Chris Talley, parents of Joe Mack Talley, were dependent upon the deceased, Joe Mack Talley; IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Walter C. Talley and Chris Talley take nothing by reason of the death of Joe Mack Talley.

IT IS ORDERED, ADJUDGED AND DECREED that Sandra Talley Payne, the wife of Joe Mack Talley at the time of his death, do have and recover of and from the defendant, Estate of Wendell Williams, the sum of Six Hundred Thousand Dollars ($600,000.00) by reason of the damages sustained by her for the wrongful death of Joe Mack Talley.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Lori Talley Payne, the minor daughter of Joe Mack Talley, do have and recover of and from the defendant, Estate of Wendell Williams, the sum of One Hundred Fifty Thousand Dollars ($150,000.00) for the damages sustained by her by reason of the wrongful death of Joe Mack Talley.

It further appearing to the Court that Vikki Talley, the minor daughter of Joe Mack Talley by a former marriage, was not dependent upon the deceased at the time of his death; IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Vikki Talley take nothing by reason of the wrongful death of Joe Mack Talley.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs do have and recover of and from the defendant, Estate of Wendell Williams, the sum of $300.00 as the reasonable expenses incurred by plaintiffs in obtaining an order for defendants refusal to answer interrogatories without substantial justification in accordance with the previous order of this Court entered the 15th day of May, 1969.

IT IS FURTHER ORDERED that the plaintiffs do have and recover of and from the defendant, Estate of Wendell Williams, interest on all of the above amounts at the rate of six percent (6%) per annum from date, and all costs of this proceeding are taxed against the defendant, Estate of Wendell Williams, for which plaintiffs may recover.

SIGNED AND ENTERED this 16th day of November, 1970.

JOE SPURLOCK

Joe Spurlock, Judge Presiding

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28323

D. C. Docket No. CA 3-3079-C

PACIFIC INDEMNITY COMPANY,

Plaintiff-Appellee,

versus

ACEL DELIVERY SERVICE, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to dissolve the injunction.

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

"Per Ingraham, C. J."